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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-277

EDWIN H. HELFANT,

Petitioner,

vs.

GEORGE F. KUGLER, Jr., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, Jr., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, Jr., and MARK A. SULLIVAN of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Respondents.

ANSWER TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ANSWER TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counter-Statement of the Case

On July 8, 1974, the Court of Appeals for the Third Circuit, sitting *en banc,* rendered its decision in *Helfant* v. *Kugler, et al.,* —— F. 2d —— (3 Cir. 1974).[1] Distilled to its essence, the majority concluded that the New Jersey Supreme Court's disciplinary investigation, which immediately preceded petitioner's appearance before the State Grand Jury, constituted such "extraordinary circumstances" as to compel federal intervention in a pending State criminal prosecution. This novel holding was premised upon petitioner's assertion that the State Supreme Court's preliminary inquiry into his ability to continue to preside as a municipal court judge compelled him to waive his Fifth Amendment privilege against self-incrimination. Succinctly stated, the majority decided that the "factual involvement of the Supreme Court would destroy the objectivity of the entire State [judicial] system in processing [petitioner's] constitutional claim" (A15). Although rejecting petitioner's application for an injunction, the majority directed that the case be remanded to the district court "for the entry of an order temporarily enjoining" the trial of the State indictment and for a "determination of whether Helfant's testimony before the grand jury . . . was the product of a free and unconstrained will" (A4).

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[1] A three judge panel of the Court of Appeals had previously rendered a decision on September 7, 1973. See *Helfant* v. *Kugler, et al.,* 484 F.2d 1277 (3 Cir. 1973). Immediately thereafter, we petitioned for a rehearing. The Court of Appeals then granted the petition and subsequently, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, and at our request, consented to a reconsideration of the matter *en banc.*

Three judges vigorously dissented. In their view traditional principles of comity militated against federal interference. The dissenting judges were unwilling to presume that members of the New Jersey Supreme Court would be unable to impartially adjudicate petitioner's constitutional claim or that they would seek to advance their own interests "by a devious, obsequious sycophancy" (A8). Further, the dissenting opinion disavowed the correctness of the postulate, presumably adopted by the majority, that the Supreme Court would be "so venal and vindictive as to mete out some administrative 'punishment'" in the event that a trial court accepted petitioner's theory (A28).

We immediately obtained a stay of the Court's mandate and applied for a writ of certiorari. Petitioner's unfounded contentions to the contrary, our purpose was not to prevent or to delay a public airing of the allegations set forth in the complaint. Rather, we sought further review because, in our view, this case presents delicate questions of federal-state comity. Thus, in our petition, we noted that this appeal raises the novel question of whether the "extraordinary circumstances" exception to *Younger's*[2] interdiction was intended to establish a distinct category justifying federal intervention in an ongoing state criminal prosecution in the absence of "bad faith" or "harassment" (P30). We further pointed out that the contours of the "extraordinary circumstances" exception have never been delineated and that scattered statements seem to indicate doubt on the part of several justices that such a distinct class exists (P19). See, *e.g.*, Mr. Chief Justice Burger's opinion in *Allee* v. *Medrano*, —— U. S. ——, ——, 94 S. Ct. 2191, 2211 (1974), and Mr. Justice Black's opinion in *Perez* v. *Ledesma*, 401 U. S. 82, 85 (1971). We

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[2] *Younger* v. *Harris*, 401 U.S. 37 (1971).

emphasized that if a separate category exists at all, it must be equated with the unavailability of a state forum for remedying the claimed constitutional deprivation. See Mr. Justice Brennan's opinion in *Perez* v. *Ledesma, supra* at 93. Our petition stressed that the State courts could impartially resolve petitioner's Fifth Amendment claim and that there was no basis for federal intervention. We pointed out that it is the constitutional duty of the New Jersey Supreme Court to initiate disciplinary proceedings and that there was nothing ominous in its conference with petitioner. Under these circumstances, we considered it a slur on the entire State judicial system to presume, as the majority below evidently did, that individual judges incapable of remaining impartial would not disqualify themselves pursuant to settled New Jersey practice (R. 1:12-1; R. 1:12-2) and that members of our highest court would refuse to obey the law they are bound to enforce. No malevolent intent having been shown, we further urged that there could be no violation of petitioner's Fifth Amendment privilege. That is so because "coercion", in the constitutional sense, requires a compelled waiver of a right by virtue of some unlawful act or unconscionable promise. Finally, we noted that petitioner had utterly failed to allege a constitutional injury which was both great and immediate. If petitioner was coerced into testifying, that would in no sense provide him with a license to lie. Thus, the false swearing charges would retain their efficacy. Further, with regard to the substantive charges, petitioner's testimony before the grand jury was not incriminatory. Hence, there is no likelihood that his statements will be used against him. It is indeed difficult to perceive what "great, immediate and irreparable" injury confronts the petitioner so as to justify federal intervention.

Although Helfant has not filed a document labelled an "answer," he has undertaken to respond to our petition by filing a cross-application for a writ of certiorari. We deem the cross-petition an answer to our initial petition. The sole question raised in the cross-petition relates to the majority's refusal to issue an injunction barring prosecution. Petitioner concludes by asking this Court to deny our petition and to review the Court of Appeals' decision to direct declaratory but not injunctive relief. This answer is in opposition to petitioner's cross-application. It would, of course, be fruitless to recount the facts at length since our petition contains a complete recital of the salient features of this case. Rather, our argument which follows refers to what we perceive to be the pivotal facts necessary for this Court's determination.

Reasons for Denying the Cross-Petition for a Writ of Certiorari

In our petition for certiorari, we suggested that Helfant had not displayed the candor required of a suiter in equity.[3] We suggested that the complaint alleged sundry factual matters, but did not disclose their context so that the reader might glean the nature of the asserted constitutional injury. The necessary basis for such an understanding required an explanation of the purpose of the conference between the Supreme Court and petitioner. As to this, we stressed that Helfant neither stated the ob-

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[3] Story, *Equity Pleading*, §23, p. 16 (9th ed. 1879). See also Adams, *Doctrine of Equity*, p. 303 (1873); Barton, *History of a Suit In Equity*, p. 42 (1847).

ject of the meeting nor asserted that the Supreme Court had not made the purpose perfectly plain to him.[4]

Helfant continues his course of studied ambiguity. In our petition, we noted that the Supreme Court did not institute any proceeding against Helfant or against Judge Moore. That is beyond dispute. There was no complaint, order to show cause or order suspending either of them from sitting in their respective courts. The purpose of the conferences with both men was to learn whether they would agree not to sit pending disposition of the charges before the grand jury. We noted in our petition that each of them agreed not to sit, thereby obviating the need to consider whether to institute proceedings for such interim suspension. As the basis for that inference we noted that court records, which may be judicially noticed, revealed that neither Helfant nor Moore presided in their respective courts following their meetings with the Supreme Court. We further alluded to Helfant's admission during the hearing on his application for a preliminary injunction that he had taken a "voluntary leave of absence" (CPA16). In support of the proposition that the conferences were for the purpose we have stated, our petition described Helfant's undisputed testimony regarding Chief Justice Weintraub's abject refusal to discuss the merits of the charges before the grand jury as to which petitioner had previously invoked the Fifth Amendment privilege. So too, Helfant, in an affidavit annexed to his complaint stated that the Chief Justice "did not want to [discuss] the merits of the matter and rightfully so."

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[4] Helfant, in his complaint, alleged that the Administrative Director did not advise him as to the purpose of the conference (A66). But the complaint does not state that petitioner was not apprised by the Supreme Court with respect to the object of the conference.

Thus, Helfant swore that the Chief Justice considered a discussion of the merits of the criminal charges beyond the purpose of the meeting. Yet he persists in obscuring the object of that conference. Rather, referring to an affidavit executed by Judge Moore (we will presently comment upon that affidavit), Helfant says in his cross-petition (CPA9):

> ". . . this belies the allegation of the State that the Court was *merely* attempting to determine whether the two judges intended to remain on the bench in their temporary positions." (emphasis ours).

We have italicized the word "merely". This is as close as petitioner comes to acknowledging that the stated purpose was indeed to discuss whether he and Moore would agree not to sit pending resolution of the charges before the grand jury. Helfant seems to be saying in his quoted statement that, notwithstanding the Court's admonition, it secretly harbored an intention to explore the merits of the underlying criminal charges. This is plainly belied by the record.

The relevant fact, so far as this litigation is concerned, is that the Supreme Court did not order petitioner to waive his Fifth Amendment privilege or threaten reprisal if he declined. Nor did the Court offer any reward to encourage Helfant to testify. This Helfant concedes.[5] We re-

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[5] The following colloquy between petitioner and the State's attorney plainly belies Helfant's contention that the Court's secret intention was to coerce him into testifying:

> "Q. Now when you returned November 8th, I believe when you appeared before the Supreme Court?
> A. Yes, sir.

(Footnote continued on following page)

peat that the Fifth Amendment was not the focus of the meeting. Judge Moore, who had previously testified freely before the grand jury, was dealt with in precisely the

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(Footnote continued from preceding page)

Q. Now at any time did any member of the Supreme Court threaten to move against you to remove your license?

A. Absolutely not.

Q. Did they threaten at all to remove you as a Municipal Judge?

A. No, sir, not verbal threats; no, sir.

Q. It is a fact, is it not, that at least approximately three weeks prior thereto you had indeed taken the Fifth Amendment before the Grand Jury?

A. Yes, sir.

Q. And there had been no action taken against you, had there, as a lawyer or Municipal Judge?

A. No, sir; that's what upset—

Q. Excuse me.

A. That's what upset me. They would call 3:30 on a Monday afternoon and tell me to be there without notice, without any reason and tell me to be there at 9:50 in the morning when I had a Grand Jury appearance and I was nervous enough about that.

Q. Did they indicate what the consequences of your—

A. They didn't discuss anything with me Mr. Laird, other than what are my intentions and do I think it right.

Q. Did Mr. Hayden threaten to take any action against you to have your license removed?

A. Mr. Hayden didn't threaten in that manner. Mr. Hayden said if I didn't cooperate—

Q. Just answer the question.

A. About the Supreme Court?

Q. No, did Mr. Hayden threaten to take any action against you to have your license removed as a lawyer; yes or no?

A. Not to take it away from me, no.

Q. Did he threaten to take any action to remove you as a Municipal Judge?

A. No." (CPA26-27).

same fashion as was Helfant, who had asserted his Fifth Amendment privilege.[6] An agreement was sought from each not to preside pending resolution of the charges.[7]

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[6] As noted in our petition, Helfant had previously appeared before the same grand jury on October 18, 1972, when he invoked his Fifth Amendment privilege. He was, thereafter, requested to reappear on November 8, 1972. Plainly, no adverse inference can be drawn against the Attorney General by virtue of the decision to resubpoena petitioner after he had previously asserted his Fifth Amendment privilege. As Helfant acknowledges, the grand jury was investigating other charges pertaining to Abe Schusterman. One charge was that Helfant arranged for a gift of an ice machine by Schusterman to a County Court judge who was scheduled to sentence him in several unrelated criminal matters. Helfant was subpoenaed to testify regarding those other events on November 8, 1972. Helfant's attorney testified that he could not recall whether petitioner wished to invoke the Fifth Amendment privilege with respect to those matters (A13-14).

[7] We add that Moore's affidavit (which is annexed to the cross-petition) is not part of the record in this case. Helfant included this affidavit in his brief in the Court of Appeals. Although we objected to this offer, the court below never ruled upon our motion to strike. In any event, the alleged reference to Helfant's signature on the withdrawal endorsement (A39) which appeared on the criminal complaint for atrocious assault and battery merely reflects Moore's testimony before the grand jury on October 25, 1972. Moore's testimony with reference to Helfant's signature is quoted at length in Count V of the indictment involved in these proceedings. As that testimony reveals, the clerk of Judge Moore's court testified that Moore directed him to dismiss the criminal complaint. Moore testified that he had nothing to do with the criminal complaint, and pointed an accusing finger at Helfant. Moore swore that Helfant's signature appeared on the withdrawal endorsement. We will again refer to Moore's testimony of October 25, 1972, as set forth in the indictment, in discussing the claim in the cross-petition that the State was guilty of foul tactics in subpoenaing Helfant to testify before the grand jury. Our point, at this juncture, is that the Moore affidavit in no sense conflicts with our contention that the purpose of the meeting with the Supreme Court was as we have stated.

In point of fact, Helfant's own affidavit states that he volunteered the statement that he "would testify without invoking the Fifth Amendment."[8]

We will deal first with the issue upon which the Court of Appeals divided, *i.e.*, whether federal intervention was warranted by virtue of Helfant's assertion that the Supreme Court "coerced" him into waiving his Fifth Amendment privilege. It bears repeating that petitioner's contention must be viewed against the backdrop of his damaging concession that no member of the Supreme Court ordered him to testify or threatened sanctions if he did not withdraw his previous assertion of the Fifth Amendment. Helfant's position, at its best, is that he harbored a fear that if he refused to testify, members of the Supreme Court would violate their oaths of office and visit some hurt upon him. In our petition, we argued that, as a matter of law, "coercion" in the constitutional sense cannot be found in the exercise by the Supreme Court of its constitutional responsibility with respect to members of the bench and bar. Nor can "coercion" be found in any apprehension a judge or an attorney may claim in response to the existence or exercise of that constitutional power. It would serve no valid purpose to repeat at length our argument in that regard. Suffice it to say, there are many pressures that come to bear on a defendant in a criminal trial, but not every "compelling"

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[8] The cross-petition states that ". . . the true coercive purpose of the Court was borne out by the very last question posed to Helfant by the Chief Justice: 'What do you intend to do today?'" (CPA8). If petitioner seeks to suggest that the Chief Justice initiated a discussion of waiver of the Fifth Amendment privilege, his own affidavit plainly belies that contention. Helfant, in that affidavit, swore that he volunteered the statement regarding his intention to testify.

influence leading to a decision to testify violates the Fifth Amendment. See *e.g.*, plurality opinion of Mr. Chief Justice Burger in *California* v. *Byers*, 402 U. S. 424, 427 (1971); *McGautha* v. *California*, 402 U. S. 183, 213 (1971); *Williams* v. *Florida*, 399 U. S. 78, 83-84 (1970); *Harrison* v. *United States*, 392 U. S. 219, 222 (1968). Rather, the Fifth Amendment privilege is rooted in the desire to protect against governmental misconduct. See *e.g.*, *Michigan* v. *Tucker*, —— U. S. ——, ——, 94 S. Ct. 2357, 2361-62 (1974). As we noted in our petition, the mere existence of the removal or disciplinary powers cannot be found to constitute "coercion" no matter how overwhelmed a judge or an attorney may say he is because of the existence of the Court's constitutional responsibility. We stress, at this posture of the case, that the cross-petition does not respond to our contention. Rather, Helfant says only that there was some misconduct which had a coercive effect upon him. We submit, however, that there is nothing in the pleadings or the proof which could support that claim.

In our petition for certiorari, we contended that, for still other reasons, there was no basis for federal intervention with respect to the self-incrimination issue. For the purpose of analysis, we separated the counts of the indictment charging substantive offenses (conspiracy to obstruct justice, obstruction of justice and compounding a felony) from those charging Helfant with false swearing in his testitmony before the grand jury. With regard to the substantive counts, we pointed out that petitioner's testimony was wholly exculpatory, and hence there was no conceivable basis for intervention. At best, petitioner's claim would not justify the issuance of an injunction since it is beyond cavil that reception before a grand jury of evidence procured in violation of an individual's constitutional rights does not serve to vitiate

the resulting indictment. See *e.g., United States* v. *Calandra*, —— U. S. ——, 94 S. Ct. 613 (1974); *United States* v. *Blue*, 384 U. S. 251 (1966); *Lawn* v. *United States*, 355 U. S. 339 (1958); *Costello* v. *United States*, 350 U. S. 359 (1966); *Holt* v. *United States*, 218 U. S. 24 (1910). When a witness has been wrongfully deprived of his privilege against self-incrimination, he can be returned to the *status quo ante* merely by the suppression of the coerced testimony and its derivative use. *Kastigar* v. *United States*, 406 U. S. 441 (1972); *Zicarelli* v. *New Jersey State Comm'n of Investigation*, 406 U. S. 472 (1972); *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892). Here, there was no need for judicial intervention since the State had stipulated that Helfant's grand jury testimony would be used, if at all, only to impeach any inconsistent statement he might utter were he to testify. We pointed out that the constitutional injury sought to be averted was thus conjectural, depending for its very existence upon a hypothetical series of events that is most unlikely to occur.

We emphasize that Helfant does not respond in any meaningful way to our argument. In short, he does not even attempt to support the basis for intervention upon which the majority rested its judgment; *i.e.*, that there was a triable issue as to whether Helfant's will not to testify was overborne. Rather, Helfant's cross-petition speaks only to the counts charging false swearing. We pointed out in our petition that the majority in the Third Circuit did not discuss our contention that the Fifth Amendment privilege does not excuse or justify the commission of perjury or false swearing, notwithstanding that the dissenting opinion dealt a length with that issue. As properly noted by the dissenting judges, perjury cannot be "self-incriminatory," since the scope of the Fifth Amendment privilege "does not endow the person who testifies with a license" to lie. *Glickstein* v. *United States*,

222 U. S. 139, 141 (1911). See also *United States* v. *Knox,* 396 U. S. 77, 82 (1969); *United States* v. *Kahriger,* 345 U. S. 22, 32 (1952). *Cf. Acanfora* v. *Montgomery City Board of Education,* —— U. S. ——, 42 U.S.L.W. 2439 (1974); *Bryson* v. *United States,* 396 U. S. 64, 72 (1969); *Dennis* v. *United States,* 384 U. S. 855, 867 (1966); *Kay* v. *United States,* 303 U. S. 1, 6 (1938). Even assuming that petitioner testified before the grand jury because he feared removal from office or disbarment, see *Lefkowitz* v. *Turley,* 414 U. S. 70 (1973); *Gardner* v. *Broderick,* 392 U. S. 273 (1968); *Uniformed Sanitation Men* v. *Sanitation Comm'n,* 392 U. S. 280 (1968); *Garrity* v. *New Jersey,* 385 U. S. 493 (1967); *Spevack* v. *Klein,* 385 U. S. 511 (1967), that would not permit him to lie with impunity. See *People* v. *Genser,* 250 Cal. App. 2d 351, 58 Cal. Rptr. 290 (1967); *People* v. *Rucker,* 45 Ill. 2d 562, 262 N. E. 2d 456 (1970); *People* v. *Goldman,* 21 N. Y. 2d 152, 287 N.Y.S. 2d 7, 234 N. E. 2d 194 (1967). If petitioner's testimony was compelled, as he contends, the "coercion" exercised was to testify truthfully, not falsely.[9] Any other conclusion would reduce the witness' oath to a meaningless shibboleth.

Significantly, Helfant's cross-petition fails to state whether the majority in the Third Circuit in fact dealt with this issue. More than that, Helfant does not challenge the validity of the authorities which we presented and upon which the dissenting opinion relied. Rather, petitioner now advances a totally different claim. Specifically,

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[9] The factual pattern here is to be distinguished from a situation in which the government has unlawfully coerced a witness to testify to certain facts. Where the witness has been forced to testify falsely, a perjury charge might well be a violation of the Fourteenth Amendment. But here, there is no allegation that Helfant was compelled to lie. Rather, petitioner's contention is that he felt himself compelled to testify.

he contends that there was "entrapment" or some violation of due process for the Attorney General to summon him before the grand jury allegedly for the sole purpose of instituting false swearing charges.

Our response to the issue Helfant seeks to inject is as follows. First, this issue is simply not in the case. The complaint did not make this allegation, nor was such a charge advanced or accepted by either the district court or the Third Circuit.[10] Second, there is nothing in the record to support it. In substance, Helfant contends that because the State advised him that he was a "target", it must follow that the Attorney General expected him to lie. He argues that the Attorney General summoned him before the grand jury for the sole purpose of adding the false swearing charges to the substantive counts. But to say that a witness is a "target" is not to suggest that the investigation is completed. Nor does it necessarily follow that an indictment against such a witness is a certainty. It means only that information in the possession of the grand jury may lead to an indictment.[11] It is not uncommon for a "target" to accept, and even to insist upon, an opportunity to testify in the hope that an indictment will not ensue. This is especially true with respect to men in public life, as to whom the bare fact of an indictment is harmful whatever the outcome of the ultimate trial. Moreover, there is no basis in the record for a charge that the Attorney General was guilty of

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[10] See *e.g.*, *Tacon* v. *Arizona*, 410 U. S. 351 (1973); *Cardinale* v. *Louisiana*, 394 U. S. 437 (1969); *Nelson* v. *City of Los Angeles*, 362 U. S. 1 (1961); *Wilson* v. *Cook*, 327 U. S. 474 (1946).

[11] See *e.g. In re Addonizio*, 53 N. J. 107, 248 A. 2d 531 (1968); *In re Boiardo*, 34 N. J. 599, 170 A. 2d 816 (1961); *State* v. *DeCola*, 33 N. J. 335, 164 A. 2d 729 (1960).

bad faith in summoning Helfant. The only relevant part of the record in this connection is the Fifth Count of the indictment. There appears the testimony of Judge Moore's clerk to the effect that the judge ordered him to dismiss the complaint for atrocious assault and battery saying that the county prosecutor had consented to that course. The same count further notes that on October 25, 1972, Judge Moore swore before the grand jury that his clerk had lied and that he (Judge Moore) had nothing to do with the dismissal. To the contrary, Judge Moore testified that Judge Helfant was the culprit and that the latter's signature appeared on the withdrawal endorsement. Thus, the record starkly reveals that it was incumbent upon the grand jury to determine whether to indict Judge Moore or Judge Helfant or both. In light of the conflicting testimony then before the grand jury, it was fair, rather than oppressive, to summon Judge Helfant. Our third response to this new allegation is that it could not justify intervention by the federal judiciary. The focus of Helfant's attack is upon the Attorney General, not upon the Supreme Court, and thus there could be no basis to assume that the State judiciary would not fairly adjudicate the issue.

The cross-petition continues to urge that the Supreme Court violated the State and Federal Constitutions, by requesting the grand jury testimony and communicating with the Attorney General with regard to the status of the criminal investigation. We pointed out in our petition that the Supreme Court is charged by the State Constitution with the administration of the judicial system including the removal of judges and the discipline of attorneys. *Constitution of New Jersey,* Article 6, Section 6, paragraphs 2 and 3, and *Constitution of New Jersey,* Article 6, Section 7, paragraphs 1 and 2. See also *N.J. S.A.* 2A:1B-1, *et seq.* We think it plainly frivolous to

say, as petitioner asserts here, that any constitutional concept bars this essential role. We note that the majority opinion nowhere indicated that it found any merit in that issue, for as already noted, the court below ordered intervention only with respect to the allegation that Helfant's will to plead the Fifth Amendment was overwhelmed.

We pointed out in our petition that no constitutional injury was presented by virtue of the Supreme Court's communications with the Attorney General. The allegations presented to the grand jury, if true, plainly justified the initiation of disciplinary proceedings against Judge Helfant, Judge Moore, or both. Surely, the Attorney General was duty-bound to apprise the Supreme Court of these serious charges. Petitioner's unsupported assertion to the contrary, the separation of powers doctrine is not offended when one branch of government cooperates with another. Nor can a constitutional issue be generated by petitioner's naked assertion that there was "collusion" between the Supreme Court and the Attorney General. Surely, a litigant cannot precipitate federal intervention in a state criminal proceeding by the mere willingness to allege "collusion" or "corruption" or the like, and to rest that charge upon the mere fact that the Supreme Court took steps which are perfectly consistent with propriety and the discharge of its constitutional responsibility.

In this connection, we comment upon the footnote which appears at page 18 of the cross-petition. Helfant there says that the record does not contain proof of the communications between the Supreme Court and the Administrative Director. He further asserts that the record is barren of any evidence relating to the Supreme Court's practice of initiating disciplinary proceedings during the

pendency of related criminal investigations. All of this is a matter of record within the Supreme Court and as such may be judicially noticed. In point of fact, as we specifically noted in our petition, this practice has been recognized and approved by the Third Circuit. See *DeVita* v. *Sills*, 422 F. 2d 1172 (3 Cir. 1970).[12] But even if this were not judicially noticed, it would not matter. It can be of no moment as to how the Supreme Court learned of the grand jury inquiry. Nor would it be significant if Judges Moore and Helfant were the only ones ever called into such a conference. It is perfectly sensible and reasonable to explore the possibility of an agreement not to sit pending resolution of criminal charges against a judge.

Petitioner also contends that the Supreme Court "deprived [him] of the right to counsel" (CP27-28). We do not know whether Helfant seeks to create the impression that the Supreme Court refused to permit counsel to attend the conference. If that is the thrust, then we point out that there is no such allegation in the complaint and nothing in the record to suggest a factual basis for such a charge. The right of a judge (or an attorney) to have counsel with him has never been denied, and Helfant nowhere says otherwise.

Equally unpersuasive is petitioner's contention that the majority failed to consider his allegation of bad faith. In our petition, we said that it was conceded that neither

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[12] In a related context, this Court has held that civil and administrative hearings need not await the conclusion of related criminal charges. See *United States* v. *Kordel*, 397 U. S. 1 (1970). See also *United States* v. *Simon*, 373 F. 2d 649 (2 Cir. 1967), *cert.* granted *Simon* v. *Wharton*, 386 U. S. 1030, vacated as moot, 389 U. S. 425 (1967).

bad faith nor harassment were present in Helfant's prosecution. In a footnote (P29), we added that "bad faith" and "harassment" signify that a prosecution is being instituted with no reasonable hope or expectation of obtaining a valid conviction.[13] In no sense does petitioner's con-

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[13] "Bad faith" and "harassment" signify that a prosecution is being instituted or threatened with no reasonable hope or expectation of obtaining a valid conviction. *Perez* v. *Ledesma*, 401 U. S. 82, 85 (1971). Under such circumstances, it is plain that the federal plaintiff's constitutional rights cannot be vindicated in the state criminal trial. *Ibid. Honey* v. *Goodman*, 432 F. 2d 333 (6 Cir. 1970), is illustrative of "bad faith" prosecutions. There, plaintiffs mailed letters to persons protesting the arrest and trial of several persons. As a result, they were charged with the offense of embracery. The plaintiffs petitioned the federal court to enjoin their prosecution, on the grounds that the prosecutions were instituted in bad faith, with no real hope of ultimate success, for the sole purpose of deterring them from the expression of unpopular ideas. The district court dismissed the complaint. On appeal, the Court of Appeals held that the lower court had erred in dismissing the suit because if the plaintiffs proved that the prosecution had been instituted without expectation of ultimate success and for the purpose of discouraging the exercise of their rights, they would have proven the bad faith necessary to secure an injunction against a pending State proceeding. See also *Eames* v. *Pitcher*, 468 F. 2d 905 (5 Cir. 1972); *Holmes* v. *Giarusso*, 319 F. Supp. 832 (E. D. La. 1970).

The factual pattern in *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), is similar. There, the appellants had offered to prove that their offices had been raided and all their files and records seized pursuant to search and arrest warrants that were later summarily vacated by a state judge for lack of probable cause. They also offered to prove that despite the state court order quashing the warrants and suppressing the evidence seized, the prosecutor was continuing to threaten the initiation of new prosecutions of appellants under the same statutes, was holding public hearings at which photostatic copies of the illegally seized documents

(Footnote continued on following page)

clusory allegation of "bad faith" meet this standard. Judge Moore's testimony, as set forth in the indictment which is a part of the record in this case, plainly reveals petition-

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(Footnote continued from preceding page)

were being used, and was threatening to use other copies of the illegally seized documents to obtain grand jury indictments against the appellants on charges of violating the same statutes.

Federal relief against a pending state prosecution was also granted in *Shaw* v. *Garrison,* 467 F. 2d 113 (5 Cir. 1972). The plaintiff had been charged with conspiring to assassinate President Kennedy and was found not guilty. Following his acquittal, the District Attorney secured an indictment charging the plaintiff with committing perjury at his trial. The federal court enjoined the perjury prosecution because it believed that there was a serious question as to whether the conspiracy charge had any basis and it found that the prosecutor had taken extreme measures in extracting information from the State's witnesses, thus raising serious questions as to the validity and objectivity of the State's case. The Court issued the injunction in order to prevent the District Attorney from hounding an innocent person.

A state prosecution was also enjoined in *Krahm* v. *Graham,* 461 F. 2d 703 (9 Cir. 1972). There, bookstore owners were charged with violating obscenity statutes. Eleven cases came to trial and none resulted in convictions. As a result, city officials instituted more prosecutions against the store owners. The federal court issued an injunction against the prosecutions because the multiplicity of charges filed against the plaintiffs made it impossible for them to raise their constitutional claims in a single criminal proceeding.

The foregoing cases illustrate the kind of conduct by state authorities that would constitute "bad faith" or "harassment" and which would give rise to a right to federal equitable relief during the pendency of a state prosecution. The cases can be divided into two categories: (1) where a prosecutor brings a prosecution with no expectation of securing a conviction, and (2) where state authorities have pursued a course of continuous harassment,

(Footnote continued on following page)

er's involvement in a criminal enterprise. Petitioner's own complaint sets forth the undisputed fact that other witnesses had appeared and had testified before the grand jury and, further, that their "testimony if believed would incriminate" him (A68). Succinctly stated, no triable issue was presented with respect to the allegation of bad faith.

Finally, we reply to that part of the cross-petition that says our application should be denied because the judgment of the Third Circuit is interlocutory. We dealt

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(Footnote continued from preceding page)

characterized by repeated arrests and prosecutions. Proof that a prosecutor has engaged in the conduct outlined above merits federal intervention in the state criminal process only because it clearly demonstrates that the prerequisite to federal injunctive relief, i.e., irreparable harm or the inability to remove the threat by defense against a single criminal prosecution, has been met. When a prosecutor secures an indictment against an individual without expectation of securing a conviction, he is not interested in bringing the case to trial. Consequently, if the defendant were not entitled to federal relief, he would be left without a forum in which to assert his constitutional rights. Similarly, the criminal defendant who is subjected to continuous harassment and repeated prosecutions needs the assistance of the federal courts if his constitutional rights are to be protected because even a successful defense of those rights in the state courts results in further prosecution. Such a defendant cannot eliminate the threat to his constitutional rights in defending a single criminal prosecution.

Plainly, nothing in the complaint reveals bad faith in bringing the prosecution in this case. Nor does Helfant's new claim of entrapment, first raised in his cross-petition, support a finding of bad faith. As we have noted, even assuming that Helfant was "entrapped," there is no reason to presume that the State court system cannot properly adjudicate that issue. Clearly, Helfant's constitutional rights can be vindicated in a single prosecution in the State courts.

with that question in our petition (P64) and stressed the need for an immediate review of the issues we had raised. We pointed out that there would not be an opportunity for us to seek a review of a favorable final judgment. In that regard, we emphasized the extraordinary import of the Third Circuit's judgment upon the relations between the federal and state judiciaries. Although the majority thought its decision could have no precedential impact outside of New Jersey, we noted that other states had similar judicial systems. We repeat that the impact of the Third Circuit's decision cannot be minimized. In this connection, we invite this Court's attention to a resolution recently adopted by the Conference of Chief Justices at its meeting in Hawaii on August 9, 1974 (Addendum A). This resolution alludes to the problem of judicial administration and the effect of federal intervention upon it. We ask this Court to grant our petition for a writ of certiorari and to deny petitioner's cross-application so that these significant issues can be resolved.

CONCLUSION

For all the foregoing reasons, we respectfully pray that our petition for a writ of certiorari be granted and the cross-petition be denied.

Respectfully submitted,

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[ADDENDUM FOLLOWS]

ADDENDUM

Resolution VIII

WHEREAS, the Conference of Chief Justices in 1971 endorsed the efforts of the Chief Justice of the United States to improve the channels of communications between state and federal courts and to eliminate abrasiveness in state-federal judicial relationships; and

WHEREAS, much improvement between state and federal judicial relations has resulted from an interchange of ideas and a discussion of mutual problems between state and federal judges through State-Federal Judicial Councils; and

WHEREAS, in recent months there have been in a few federal district courts and circuit courts of appeals certain decisions which threaten to negate the effectiveness of efforts to improve state and federal judicial relationships in that these federal courts, below the United States Supreme Court level, unreasonably have invaded areas which historically and traditionally are recognized to be within the exclusive jurisdiction of state courts, as for example the matter of state bar admissions and the internal administration of state court systems;

NOW, THEREFORE, BE IT RESOLVED by the Conference of Chief Justices duly assembled in Plenary Session on August 16, 1974, as follows:

1. That each state judicial system is urged to continue its efforts to bring about a cooperative and cordial relationship between state and federal judicial systems through open communication and with the interchange of ideas and mutual recognition of

the responsibilities of each system through State-Federal Judicial Councils and other means.

2. That the "exhaustion of state remedies" doctrine must be strictly adhered to in areas which have historically and traditionally been within the exclusive jurisdiction of state courts, including state bar admissions and internal administration of state court systems and in the joint jurisdiction of the federal and state authorities; otherwise, the marked improvement in state-federal judicial relationships which has occurred in recent months will be substantially eroded.

3. That various organizations interested in proper state-federal judicial relationships, including State-Federal Judicial Councils, the Federal Judicial Center, the Administrative Office of United States Courts, the National Conference of Federal Trial Judges, the Judicial Conferences of United States Courts, and the State-Federal Judicial Relations Committee of the American Bar Association, be called upon to bring to the attention of their judicial members the importance of maintaining proper and cooperative relationship between state and federal judiciaries in the areas above delineated.

4. That Congress is called upon to enact legislation requiring the exhaustion of state judicial remedies before federal courts may entertain jurisdiction of matters which have been traditionally and historically within the exclusive jurisdiction of state court systems such as bar admissions and the internal administration of state judicial systems.